YUSRI MOHAMAD & ANOR

v.

AZNAN MOHAMAD & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-193-2001]
31 JULY 2002

ROAD TRAFFIC: *Negligence - Collision between motorcycle and motorcar - Whether there was evidence of car sustaining mechanical failure - Whether place of impact an emergency lane - Whether such lane commonly used by motorcyclists - Whether liability established*

A collision occurred between the respondents, who were on a motor cycle, and the appellants being the occupants of the motorcar. The appellants alleged that their car had broken down and that they had pulled over to where they claimed to be an emergency lane. They contended that the respondents had collided with their car which was stationary. The respondents argued that they had collided when the appellants had abruptly cut into their path from a stationary position to enter into the mainstream of traffic.

At the Sessions Court, the trial judge had found for the respondents and held that the appellants were fully liable. Dissatisfied, the appellants appealed.

Held:

[1] In absence of evidence to the contrary, the sessions judge was correct in finding that the appellants failed to prove that their car had indeed broken down. Furthermore, there was no evidence to prove that the lane in question was an emergency lane. There was no indication that it had been gazetted as one, or any signs to that effect. (pp 45 e & 46 e &f)

[2] The appellants' car had no right to be on that lane, which evidence proved that it was commonly used by motorcyclists. The collision occurred due to the wanton act of the appellants in cutting into the respondents' path without any signal. The appellants' total negligence had been established. (p 46 d & g)

[Appeal against liability dismissed; appeal against quantum allowed; parties to bear own costs.]

For the appellants/defendants - VK Dasaratharaj; M/s VP Nathan
For the respondents/plaintiffs - NT Veloo (Ravi Veloo); M/s Baljit Singh & Co

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts

On 29 April 1996 at or about 10.45am the 1st respondent/plaintiff was riding motorcycle PCQ 5344 with the 2nd respondent/plaintiff as pillion along the North/South Highway and proceeding from the direction of Alor Star towards Pulau Pinang when a collision occurred between the said motorcycle and motorcar KAF 110 driven by the 1st defendant as the servant or agent of the 2nd defendant. The highway towards Penang, based on the key and sketch has two lanes being 7.30 meters in total width. On the left is another lane measuring 2.70 meters which is stated to be the emergency lane, although the agreed key and sketch plan tendered in court does not state that this is an emergency lane.

Plaintiffs' Case

The pleaded case of the plaintiffs is that as the 1st plaintiff reached km 115.4 the 1st defendant suddenly and without warning cut into the plaintiffs' path from a stationary position on the left of the emergency lane, intending to enter into the mainstream of traffic.

Case For The Defence

As for the pleaded case of the defendants I am unable to ascertain what it is as the defendants/appellants have failed to include in the record of appeal certain pages of their defence. This is a terrible state of affairs. The defendants attack the plaintiffs' case on its pleadings. Yet the record of appeal prepared by the defendants shows pages missing from their own defence for this court's consideration. From the particulars of negligence pleaded against the 1st plaintiff the defendants aver that the 1st plaintiff collided into their stationary motorcar.

Findings Of The Court

The investigating officer testified that the rear right boot and mudguard of the motorcar were dented, and its rear signal light was broken. On the other hand the damages to the motorcycle were all at the front namely the speedometer cover was broken, the handle bent, the front mudguard had scratch marks, the left and right signal lights, the left clutch and the brake, were broken. Under cross-examination the investigating officer said that the lane in which the accident occurred that is the 2.70 meters width lane, is an emergency lane.

However in re-examination he said that usually that particular so-called emergency lane, is used by motor cyclists.

The 1st plaintiff testified that as he was riding along that lane toward Pulau Pinang he noticed the defendants' car ahead of him about 50 feet away and moving slowly. Suddenly the said motorcar moved into his path in an attempt to get into the main stream of traffic, without giving any signal. He couldn't swerve anymore to the right as both the lanes on the right were full of vehicles heading towards Penang as it was the second day of Hari Raya. Under cross-examination he admitted his speed was between 60-70 km/j. He agreed to a suggestion by counsel for the defendants that if he had been travelling slower he could have been able to swerve to the right. However he said that when he was about 25 feet from the car it suddenly swerved out to the right. He denied the defence suggestion that he had collided into the defendants' stationary car. The 2nd plaintiff, the wife of the 1st plaintiff, testified that she did not see the accident. With these three witnesses the plaintiffs closed their case. The 1st defendant did not testify. No reasons were given to the court as to why the 1st defendant was unable to testify.

From the totality of the evidence before her and devoid of any explanation either from the 1st defendant or from any mechanic confirming that the defendants' motorcar had indeed broken down and therefore was on the so-called emergency lane, the learned Sessions Court judge came to the inevitable and correct conclusion that there was no evidence that the defendants' car had indeed broken down. Further, having seen and heard the evidence of the 1st plaintiff she made a finding that he was an honest witness. An appellate court ought not to upset such a finding when all evidence too points to the irresistible conclusion that she was right in finding the 1st defendant totally liable.

The 1st plaintiff had consistently maintained that the 1st defendant was in motion and was about to enter the mainstream of traffic without giving any signal when he collided into the rear of the defendants' car. In his pleadings, in his police report and in his evidence the 1st plaintiff had maintained this stand. On the other hand whilst the defendants had pleaded that their vehicle was stationary when the 1st plaintiff collided into it, this version was never strenuously put to the plaintiffs. Counsel for the defendants in his cross-examination seems to have accepted the plaintiffs' version that the 1st defendant was actually in motion because the flow of his cross-examination was on this premise. The only time counsel ever came near to his pleaded version was when he asked "Adakah Encik setuju

kemungkinan kereta tidak bergerak langsung?" The response was "Saya tidak setuju". And so it must then come to pass that where counsel had abandoned his pleaded version and had accepted the plaintiffs' version and when his own client failed to testify the Sessions Court judge cannot be faulted for accepting the 1st plaintiff's evidence.

Whilst I agree that the 1st plaintiff's own conduct can be scrutinised to see if he had contributed in any way to the accident, I can find no such evidence. Whilst he agreed that if he had proceeded slowly he could have swerved to the right lane, one has to test this admission with his own previous evidence that the very reason he used this so-called emergency lane was because both the normal lanes were heavy with traffic. Since the lane nearest to him and being the slower lane was packed with traffic, the inevitability of a collision occurring between the 1st plaintiff's motorcycle and vehicles in that line, if he had swerved into that lane, cannot be discounted. In any case whilst the highway allowed a speed of 110km/j his own speed was between 60-70 km/j. I find that the collision however occurred because of the wanton act of the 1st defendant in cutting into the plaintiffs' path without giving any signal.

As to whether the lane in which the accident occurred is to be construed as an emergency lane where no vehicle other than vehicles which had broken down could be parked, I am not prepared to hold that there was such an emergency lane.

Surely if it was an emergency lane there would have been signs to that effect and the investigating officer would have testified to that effect. There is also no evidence if that lane had indeed been gazetted as an emergency lane. The investigating officer himself is unsure because he confirmed that usually that lane is used by motor cyclists. So, since there is no evidence that the defendants' motorcar had indeed sustained a breakdown, the defendants' motorcar had no right to be on that lane which is usually used by motor cyclists. Therefore whichever way one looks at it, the 1st defendant's total negligence has been established.

I therefore dismissed the appeal against liability and allowed the appeal against quantum and ordered that each party was to pay its own costs. This appeal by the defendants against my decision is only against liability.

Personal Attacks On High Court Judges By A Court Of Appeal Judge

Now it pains me to deal with a subject that has been hitting the news recently. I have noticed that for a few years now a particular judge of the Court of Appeal has been making personal attacks against High Court judges. Whilst a few have received very uncomplimentary remarks, I have been targeted for personal vilification. Whilst no other judge of the Court of Appeal has descended to base, coarse and crude remarks against judges it seems that Mr. Justice Gopal Sri Ram is the only one who has been making these personal attacks. Whilst I agree that as an appellate judge he has every right to criticise my judgments but by no means will I accept his personal attacks against me.

Against the latest judgment of mine in which he sat to hear the appeal, he accused me of being vindictive and passing judgment to satisfy my ego. He has no right to make such personal attacks. He must know that a judge sitting to hear a case at first instance goes through the witnesses, the evidence and the submissions and then forms an opinion and that opinion becomes his judgment. Only a judge who has been a High Court judge will appreciate this. That judgment of a single judge is subject to appeal before three judges of the Court of Appeal. They too give an opinion. If their opinion concurs with that of the High Court judge the appeal is dismissed; if their joint opinions vary with that of the High Court judge then their opinion becomes the subsequent judgment. That joint opinion is again subject to appeal before the Federal Court. The Federal Court judges could if they want rain such similar dastardly attacks against him. But then they are gentlemen up there and such personal attacks is anathema at that level. So Mr. Justice Gopal Sri Ram cannot play God and conclude that his opinion is as infallible as God's judgment. As his own judgments have been reversed many a time by the Federal Court he must realise therefore that condemning and criticising a judge of the High Court and calling him names demeans the high office he holds, because the Federal Court might just find him wrong. Unless he can say that he has entered the mind of the High Court judge he will not know if there was any reason for the judge to pass such a judgment as he did because what the Court of Appeal sees is the cold stare of hard print in the appeal record, devoid of the emotions and feelings that are generated at a trial. Mr. Justice Gopal Sri Ram is turning the judge into a villain. He has muddied "the very stream of justice that a judge by his oath of office has sworn to keep pure". And these are his own words which he had expressed against me in the latest judgment.

If he has a personal grudge against a High Court judge he should not violate the oath of office he has taken by sitting in judgment over a case decided by that judge. He should disqualify himself. This is a case of a pot calling the kettle black. I understand that even a consensual call by his fellow judges to refrain from making such personal attacks has fallen on deaf ears.

Mr. Justice Gopal Sri Ram has by making unwarranted and personal attacks against me, sullied the hallowed name of justice. He must practice what he preaches. He must know that each time he makes a personal attack upon a judge in future, a response will come swift and fast.